BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Southwestern Bell Telephone Company, d/b/a AT&T Missouri,	)	
Complainant,	)	
v.	)	**File No. TC-2010-0107**
Davidson Telecom, LLC; KMC Data, L.L.C.; KMC Telecom III, LLC; Level 3 Communications LLC; Matrix Telecom, Inc.;	)	
Respondents.	)	

LEVEL 3 COMMUNICATIONS LLC'S MOTION TO DISMISS

Level 3 Communications, LLC ("Level 3") moves to dismiss the complaint and in support, states as follows:

I. INTRODUCTION

Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T") filed a complaint against Level 3 and other carriers asking the Commission to compel the respondents to sign amendments to their Missouri interconnection agreements ("ICAs") pursuant to the intervening law provisions of these ICAs. AT&T contends the ICAs must be amended because of the enactment of Missouri House Bill 1779 in 2008. HB 1779 provides in part:

> Interconnected voice over Internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges. (Sec. 392.550(2) RSMo.)

After passage of HB 1779, AT&T tendered a proposed ICA amendment to Level 3, purportedly to incorporate this change (See Exhibit E to AT&T Complaint). The Amendment tendered to Level 3, which is clearly broader in scope than the provision of HB 1779 which it purports to implement, provides in section 2 as follows:

> **House Bill 1779, Section 392.550.** The Parties shall exchange enhanced/information services traffic, including without limitation Voice Over Internet Protocol ("VOIP") subject to the appropriate exchange access charges to the same extent that telecommunications services are subject to such charges;

The Federal Communications Commission ("FCC") and the 8th Circuit have held that interconnected Voice over Internet Protocol services are solely within the FCC's jurisdiction because "it would be impractical, if not impossible to separate the intrastate portions of VoIP service from the interstate portions, and state regulation would conflict with federal rules and policies." *Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007). The interconnected VoIP services that Level 3 provides include nomadic interconnected VoIP services, similar to those offered by Vonage. In addition, as a wholesale carrier that does not itself serve residential end user customers, Level 3 does not distinguish between nomadic interconnected VoIP services and fixed interconnected VoIP services; indeed, a single Level 3 wholesale provider customer may provide both. Moreover, the FCC has said it will preempt state regulation of other VoIP services as well. *See Vonage Holding Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Util. Comm'n*, 19 FCC Rcd. 22404, 22424 ¶ 32 (2004). The FCC has further explained that it, "and not state commissions, has the responsibility to decide if such regulations will be applied." *Vonage v. Nebraska Public Service Commission*, 564 F.3d 900, 905 (8th Cir. 2009). Here, however, the Missouri General

Assembly, through HB 1779, and not the FCC, has decided that access charges should be imposed on interconnected VoIP service. Because the Missouri Legislature's action is preempted by federal law, the Commission lacks authority to enforce the legislation and hence cannot compel Level 3 to execute the Amendment. The Commission thus should dismiss the Complaint.

The federal Communications Act also precludes the extension of access charges to interconnected VoIP services because interconnected VoIP services did not exist in 1996 and there was no pre-1996 rule governing the exchange of such traffic. For this reason as well, the Commission must dismiss the Complaint.

II. THE FEDERAL COMMUNICATIONS COMMISSION IS THE ONLY ENTITY THAT CAN DECIDE WHETHER ACCESS CHARGES APPLY TO INTERCONNECTED VOIP SERVICES.

The FCC has held without equivocation that because the interstate and intrastate components of interconnected VOIP services cannot be separated without negating valid federal policies and rules, state regulation of VoIP services is preempted. *In Re: Vonage Holdings Corp*., 19 FCC Rcd. 22404, 22405 at ¶¶23- 32. (2004) ("*Vonage Preemption Order*"). "Under the impossibility exception, the FCC may preempt all state regulation of services which would otherwise be subject to dual control if it is impossible or impractical to separate the service's interstate and intrastate components, and the state regulation interferes with valid federal rules or policies." *Vonage v. Nebraska Public Service Commission*, 564 F.3d at 904. The FCC has decided that "it must have sole regulatory control" over VoIP services. *Vonage v. Nebraska Public Service Commission*, 564 F.3d at 905. The FCC has explained that it, "and not state commissions, has the responsibility to decide" if traditional telephone regulations "will be

applied." . *Id*. The FCC has likewise emphasized the importance of implementing a "single national policy" for interconnected VoIP. *See Vonage Holdings Corporation Petition for Declaratory Ruling*, Mem. Op. & Order, 19 FCC Rcd 22404 ¶ 33 (2004).

The Missouri Legislature cannot, consistent with the Supremacy Clause of the United States Constitution, overturn the FCC's determination that it alone has the authority to decide the rules that will be applicable to interconnected VoIP services. The impact of the FCC's *Vonage Preemption Order* was not limited to a single state: as the FCC stated, "comparable regulations of other states must likewise yield to important federal objectives." 19 FCC Rcd 22405 ¶ 1. In deciding to preempt state regulation of interconnected VoIP, the FCC concluded that there is, "quite simply, no practical means to sever [the specific interconnected VoIP service] into interstate and intrastate communications that enables the [challenged state order] to apply only to intrastate calling functionalities without also reaching the interstate aspects" of the interconnected VoIP service. *Vonage Preemption Order*, ¶30. The FCC went on to conclude that the "practical inseverability of other types of IP-enabled services having basic characteristics similar to [the specific interconnected VoIP service] would likewise preclude state regulation to the same extent described herein." *Id.* at ¶32. These conclusions were upheld by the United States Court of Appeals for the Eighth Circuit, in which this Commission resides. *See Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007). As a result of this exclusive federal jurisdiction over interconnected VoIP services, the Missouri Legislature no longer has authority to dictate rates, terms and conditions for this traffic.

Moreover, the 8th Circuit recently reaffirmed that the FCC's conclusions remain valid. In rejecting Nebraska's attempt to apply traditional telecommunications regulation – state universal service fees – to Vonage, the Court held once again that because Vonage's interconnected VoIP service cannot be separated into interstate and intrastate usage, "the impossibility exception is determinative." *Vonage v. Nebraska Public Service Commission*, 564 F.3d 900, 905 (8th Cir. May 1, 2009).[1] Significantly, the Court ruled that because the FCC has decided that it will have sole regulatory control to decide whether a universal service fund surcharge will apply to VoIP services, attempts by states to do so would constitute interference with federal policy. *Id*. at 904-905. In reaching this conclusion, the Court relied upon the FCC's finding in its *Vonage Preemption Order* that:

> In [preempting Minnesota's regulation] . . ., we add to the regulatory certainty we began building with other orders adopted this year regarding VoIP . . . by making it clear that *this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services* having the same capabilities.

Nebraska Public Service Commission, 564 F.3d at 905 (citing *Vonage Preemption Order* at ¶1) (emphasis in text).

Notably, HB 1779 is not a law of general applicability covering all businesses conducting business within the state of Missouri, *see Vonage Preemption Order*, 19 FCC Rcd. At 22405 ¶ 1, but it is a statute affecting state telecommunications regulation. Indeed, it applies a part of "traditional 'telephone company' regulations" to

[1] In July 2009, a New Mexico district court also reached the identical result as the Eighth Circuit in *Nebraska Public Service Commission* in a case involving another state USF fee. *See New Mexico Public Regulation Commission v. Vonage*, 2009 WL 2430878 (July 28, 2009). Following the Eighth Circuit, the district court concluded, "The Eighth Circuit affirmed the lower court's interpretation of the Vonage Preemption Order and its conclusion that Vonage's nomadic VoIP service cannot be separated into interstate and intrastate usage. *Neb. Pub. Serv. Comm'n,* 564 F.3d at 904. I agree with the Eighth Circuit and find that federal preemption applies in this case." 2009 WL 2430878 *6.

interconnected VoIP providers, even though that was exactly the type of legal rule that the FCC preempted in its *Vonage Order*. *Id*. at 22404 ¶ 1.

Nor can HB 1779 be saved here by attempting to draw a distinction between nomadic and so-called "fixed" VoIP. While Level 3 is largely a wholesale provider of services to other interconnected VoIP providers, it is now offering VoIP service to enterprise customers. Some of those entities provide "nomadic" services, some provide "fixed" services, and some provide both. From Level 3's perspective, there is no difference in how these services are engineered or provisioned. To impose a fixed/nomadic distinction on Level 3 with respect to access charges would be to require Level 3 to do precisely what the FCC refused to force Vonage to do in the *Vonage Preemption Order*: develop systems to track the end point of individual calls when the interconnected VoIP provider has no reason to do so.

Moreover, HB 1779 purports to apply access charges to interconnected VoIP even if interconnected VoIP is an "information service." However, as the court in *Vonage v. Minn. Public Util. Comm'n* held, "state regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated." 290 F. Supp 2d 993, 1002 (D. Minn. 2003), *aff'd on other grounds*, 394 F.3d 568 (8th Cir. 2004). *See also Comcast IP Phone of Mo. v. Missouri Pub. Serv. Comm'n*, 2007 U.S. Dist. LEXIS 3628 at *14 ("If the FCC declared that all VoIP services were 'information services' and not 'telecommunications services,' then the MoPSC would have no jurisdiction over any VoIP service.") The FCC has established that an information service provider may obtain access to the public switched network by purchasing services under ordinary business tariffs as an

end user. 47 C.F.R. § 69.5(b). Yet HB 1779 directs that access charges be levied on such traffic, which would overturn the FCC's rule.

Punctuating HB 1779's impermissible intrusion into the FCC's jurisdiction is that the precise question HB 1779 attempts to resolve – whether access charges will be applicable to interconnected VoIP services – is pending before the FCC. The FCC, in its *IP-Enabled Services Rulemaking*, posed a series of questions that are at the heart of HB 1779:

> The Commission seeks comment on the extent to which access charges should apply to VoIP or other IP-enabled services.
>
> Under what authority could the Commission require payment for these services?
>
> *If charges should be assessed on these services, should they be the same as the access charges assessed on providers of telecommunications services, or should the charges be computed and assessed differently?*
>
> If, on the other hand, VoIP or other IP-enabled services are classified as telecommunications services, should the Commission forbear from applying access charges to these services, or impose access charges different from those paid by non-IP-enabled telecommunications service providers?
>
> If commenters believe charges should be assessed, must carriers pay access charges, or should they instead pay compensation under section 251(b)(5) of the Act [reciprocal compensation]?

In the Matter of IP-Enabled Services, 19 FCC Rcd. 4863, 4904-4905 (2004) (emphasis added). These questions are for the FCC to resolve.

These questions confirm the FCC's intent to determine what regulations apply to interconnected VoIP services. The question quoted above in italics presents for FCC resolution precisely the issue that the Missouri Legislature purports to resolve in HB 1779: whether "exchange access charges" (as that term is used in HB 1779) will apply

to VoIP traffic or whether some other regime will carry the day. Missouri's approach invites a system in which VoIP traffic is subject to 50 different intercarrier compensation regimes, further conflicting with the FCC's express intent to set a "single national policy" for interconnected VoIP services. The Supremacy Clause does not permit that outcome here. Thus, AT&T's complaint must be dismissed for failure to state a claim upon which relief can be granted.

III. 47 U.S.C. § 251(b)(5) AND THE D.C. CIRCUIT'S DECISION IN *WORLDCOM v. FCC* PRECLUDE ASSESSING ACCESS CHARGES ON INTERCONNECTED VOIP TRAFFIC.

The federal Communications Act precludes the extension of access charges to interconnected VoIP services because interconnected VoIP services did not exist in 1996 and there was no pre-1996 rule governing the exchange of such traffic. As the FCC has recognized, Section 251(b)(5)—the Act's reciprocal compensation provision—applies to all telecommunications traffic unless that traffic is carved-out by another provision of the Act, Section 251(g).[2] The D.C. Circuit, in 2002, ruled that Section 251(g) cannot function as a "carve-out" with respect to traffic exchanges that were not covered by a pre-1996 rule. [3]

In *WorldCom*, the D.C. Circuit, in a decision issued pursuant to the Hobbs Act (28 U.S.C. § 2341 *et seq.*), and thus binding in all circuits, examined the FCC's determination that traffic exchanged between ILECs and CLECs bound for an Internet Service Provider (a type of information service provider) qualifies as "information

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[2] *Intercarrier Compensation for ISP-bound Traffic,* Order on Remand and Report and Order, 24 FCC Rcd 6475, 6483 ¶ 16 (2008), *appeal pending sub. nom. Core Communications v. FCC*, Docket No. 08-1365 (D.C. Cir.)("*ISP 2008 Order on Remand*");*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 ¶ 32 (2001) ("*ISP-Bound Traffic Remand Order*") *remanded on other grounds, WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*Worldcom*").

[3] *See WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*Worldcom*").

access" traffic subject to access charges. The court rejected the FCC's expansion of "information access" to LEC exchanges of ISP-bound traffic, holding that Section 251(g) preserves only those "restrictions and obligations" related to interstate access that existed prior to the 1996 Act.[4] Because "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic,"[5] the court held that Section 251(g) did not "preserve" the FCC's authority to regulate the exchange of this traffic as information access. The Court thus overturned the FCC's assertion that it could establish an intercarrier compensation regime other than reciprocal compensation when no pre-Act rule existed.

The D.C. Circuit's interpretation of Section 251(g) in *WorldCom* applies equally to intercarrier compensation between a LEC and another carrier bound for a provider of interconnected VoIP services, or terminated on the PSTN (public switched telephone network) from a provider of interconnected VoIP services. Just as there was no "pre-Act" rule governing the exchange of ISP-bound traffic, there were no pre-Act rules governing exchange of interconnected VoIP traffic – nor could there have been, because interconnected VoIP traffic did not exist in 1996. Absent any such pre-Act rule, access charges cannot apply to such traffic under Section 251(g): *WorldCom* prohibits extension of pre-1996 Act rules by analogy. Rather, without Section 251(g), the reciprocal compensation regime of Section 251(b)(5) applies to the exchange of all traffic between an ILEC and another telecommunications carrier, such as Level 3.[6]

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[4] *See WorldCom,* 288 F.3d, at p. 433.
[5] *WorldCom,* 288 F.3d, at p. 433.
[6] *See ISP 2008 Order on Remand*, 24 FCC Rcd at 6483 ¶ 16*; ISP-Bound Remand Order*, 16 FCC Rcd at 9165-66 (¶ 31).

Accordingly, the D.C. Circuit's decision in *WorldCom* precludes application of interstate access charges to the exchange of interconnected VoIP traffic between AT&T, an ILEC, and Level 3, a CLEC. Traffic exchanged between a LEC (AT&T) and another telecommunications carrier that is bound for or originates from an interconnected VoIP provider must therefore be subject to Section 251(b)(5)'s reciprocal compensation regime. For this reason as well, AT&T's complaint must be dismissed for failure to state a claim upon which relief can be granted.

III. CONCLUSION

For the foregoing reasons, Level 3 Communications, LLC requests entry of an order dismissing AT&T's complaint. AT&T's claims are preempted by FCC action in the *Vonage Preemption Order*, and are precluded by Sections 251()(5) and 251(g) of the federal Communications Act, as interpreted by the United States Court of Apppeals for the D.C. Circuit's binding decision in *WorldCom v. FCC*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been served electronically on Staff Counsel at gencounsel@psc.mo.gov, the Office of Public Counsel at opcservice@ded.mo.gov, and counsel for AT&T Missouri at rg1572@att.com, and on all other parties of record either electronically or by mail, on this 13th day of November 2009.

/s/ William D. Steinmeier